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NTSB Order No. EA-3737

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 14th day of November, 1992

Petition of)	
)	
RAUL QUINTANA)	
)	
for review of the denial by)	Docket CD-11
the Administrator of the)	
Federal Aviation Administration)	
of the issuance of a special)	
purpose pilot certificate)	
)	

OPINION AND ORDER

Petitioner has appealed from the oral initial decision issued by Administrative Law Judge William E. Fowler, Jr., at the conclusion of an evidentiary hearing held March 20-21, 1990.¹ We deny the appeal.²

The facts are simple. Petitioner is a pilot employed by

¹A copy of the oral initial decision, an excerpt from the transcript of the hearing, is attached.

²Petitioner's request for leave to file a brief responsive to the Administrator's reply, opposed by the Administrator and for which good cause has not been shown, is denied. We do not need an additional filing properly to assess the value and import of testimony, differentiate between argument and evidence, and determine the applicable law in this proceeding.

Trans International Crew Leasing (TICL), a company that contracts with pilots and then leases them to Part 129³ operators that do not employ their own crews. Tr. at 75-80. Mr. Daniel Stemen, crew scheduler for TICL, sought from the FAA special purpose pilot certificates (SPPC) for a number of pilots, including petitioner. Mr. Stemen dealt with Mr. Raul Pomales, an FAA employee in the International Unit of the Miami Flight Standards District office. From mid-1988 (beginning with his assignment to this position) until December 1988 (when he learned of contrary FAA policy), Mr. Pomales issued TICL approximately a dozen SPPCs for foreign pilots that TICL would furnish to certain South American cargo carriers.⁴ Initially, more than one SPPC was issued per pilot, each SPPC identifying a different carrier. Later, apparently to save paperwork, Mr. Pomales issued only one SPPC per pilot, and it listed multiple carriers for whom the pilot could operate.

In January 1989, petitioner sought a SPPC applicable for three foreign air carrier lessees. Instead, the FAA issued him a SPPC applicable for only one of the lessees, claiming that 14 C.F.R. 61.77 and FAA policy restricted to one the number of foreign air carriers that may be issued on a SPPC.⁵

The law judge found that petitioner was not entitled to additional certificates. He upheld the FAA's action, concluding

³14 C.F.R. Part 129, applicable to foreign air carriers.

⁴Tr. at 40, 111, 116, 118.

⁵Title 14 C.F.R. 61.77 is reproduced in the Appendix.

it was not arbitrary or capricious, but was supported "by law and regulation as well as its [the FAA's] long-standing policy." Tr. at 524.

Petitioner claims that the policy alleged by the Administrator and found by the law judge is not reflected in the rules or other reliable FAA documents, that this policy has not been uniformly applied, that it was developed for this case, either to harass the involved foreign air carriers and TICL (already the subjects of FAA investigation) or simply to justify a new policy on an issue that had not been addressed before, and that it is arbitrary and capricious, with no useful purpose. The Administrator responds that the policy is one of long-standing, is sensible and, even were it not, the Board has no authority to overrule it.⁶

Given this debate concerning our authority, we address that critical question first. We think both sides have

⁶We reject petitioner's claim that the law judge's ultimate conclusion for the Administrator was legally indefensible in light of his denial, at the close of petitioner's case, of the Administrator's motion to dismiss.

This denial indicated only that petitioner had made a prima facie case, warranting continuing the proceeding. "Prima facie evidence is a question of fact. It is that factual evidence that is sufficiently strong for his opponent to be called upon to answer it. A prima facie case has been made if there is sufficient proof to support a sought finding, disregarding evidence to the contrary." Administrator v. Kiscaden, NTSB Order EA-3618 (1992) at fn 4, p. 3. The motion was denied on the grounds that the petitioner had presented a prima facie case sufficient to require the Administrator to respond. This is far different from finding, as the law judge ultimately did, that the petitioner did not meet his burden of proof by a preponderance of the evidence. And, contrary to petitioner's claim, the Administrator did elicit additional information from his witness.

mischaracterized our role. The Administrator states the issue too simplistically by claiming that our "scope of review is limited to determining whether Petitioner meets the eligibility requirements. . . ." Reply at 16. Petitioner, on the other hand, seeks our broad review of the substance of the FAA's reasoning. Our role is somewhere in between.

Petitioner's citations to the contrary notwithstanding, we agree with the Administrator that it is not the Board's role to review the rationale for or reasons behind the one certificate/one lessee policy. This is a substantive policy matter in which we will not intervene. See, e.g., Administrator v. Ewing, 1 NTSB 1192, 1194 (1971) ("[I]t is well settled that the Board does not have authority to pass on the reasonableness or validity of FAA regulations, but rather is limited to reviewing the Administrator's findings of fact and actions thereunder."). Thus, contrary to petitioner's urging, we will not address whether an FAA policy of one certificate/one lessee is arbitrary, capricious, or in any fashion unreasonable as a policy matter.⁷

We also will not consider challenges to the legality of the

⁷Nor will we comment on petitioner's claims that the FAA's intent was to curtail the business of the aircraft's lessors. Appeal at 18. (It would appear that petitioner meant both the aircraft lessors and lessees. See Tr. at 14.) Petitioner's citations to decisions dealing with the judiciary's review of agency decisionmaking are not particularly apt. The Board's role is limited to a review of the denial of petitioner's request for a multi-carrier certificate; we are not authorized to engage in a broad inquiry into the soundness of agency policy applicable to that request.

manner in which a rule or policy is adopted, or other aspects of its enforceability. See, e.g., Administrator v. Lloyd, 1 NTSB 1826, 1828 (1972) (Board has no authority to review constitutionality of FAA regulations); and Administrator v. Air San Juan, NTSB Order EA-3567 (1992) at 9, citing Administrator v. Smith, NTSB Order EA-3469 (1992) pps. 2-3 ("Board has generally declined. . . to consider the validity of the Administrator's policy-making procedures, as these are typically subject to direct judicial appeal").

Finally, contrary to his position, petitioner has no "right" to the relief he seeks. The SPPC is a privilege extended him, provided he meets terms set by the Administrator.

There are, nevertheless, a number of issues properly before us. If, as the statute directs, we are to determine whether eligibility requirements have been met, we must first decide whether those requirements are clear from the rules themselves or whether they are supported by a reasonable interpretation of an ambiguous rule, the interpretation being demonstrated using other evidence (for example, evidence of the Administrator's past statements and activities). Although this is an issue of first impression for the Board in the context of a petitioner seeking a certificate, where the petitioner bears the burden of showing entitlement, the Board recently performed a similar exercise in Administrator v. Miller, NTSB Order EA-3581 (1992), in which the Administrator sought to impose a penalty, via certificate

suspension, based on a new interpretation of a rule.⁸

In Miller, as here, the Administrator offered an interpretation of a regulation to encompass petitioner's behavior. We recognized there that rule interpretation may occur through adjudication, and that proposition is not directly challenged here.⁹ We also noted in Miller that the absence of explicit language in the rule, or precedent on the point, is not controlling. Instead, we must ask:

whether the interpretation now sought by the Administrator is sensible and in conformance with the purpose and wording of the regulation. The underlying purpose of the regulation and prior expressions by the Administrator, particularly if they are inconsistent with the position now advanced, obviously have a bearing on whether the contested interpretation can be accepted. . . . [T]he real question is whether the Administrator's proposed interpretation . . . was reasonable.

Id. at 4-5. In framing the issue in this fashion, we adopted and followed the principles discussed in Martin v. OSHRC, ___ U.S. ___, 111 S.Ct. 1171, 1176 (1991).

Within this framework, we first ask whether the Administrator's interpretation is consistent with the wording of

⁸Miller was decided prior to enactment of P.L. No. 102-345, the FAA Civil Penalty Administrative Assessment Act of 1992. That Act, in amending 49 U.S.C. 1471(a)(3), added a subsection (D)(iii), which provides that the Board "shall be bound by all validly adopted interpretations of laws and regulations administered by the [FAA]...". For the reasons discussed infra, we have no basis on this record to find this FAA interpretation of its regulation not validly adopted.

⁹Petitioner appears to take the position that, if the FAA has issued multiple-carrier SPPCs before, it must do so with petitioner. Tr. at 446-447. In a sense, this challenges the FAA's right to reinterpret its rules. We address this question infra.

the regulation itself, and we are compelled to answer that the regulation is ambiguous. We agree with petitioner that the rule does not expressly prohibit either the holding of more than one certificate or the listing on one certificate of more than one foreign carrier/lessee, and it is true that the rule often uses the word "certificates." That does not, however, direct the conclusion that the relief petitioner seeks is contemplated by the rule.

The Administrator's sole witness was Mr. Pomales. Despite his identification during discovery as an individual knowledgeable on the subject (see Deposition of Raul Pomales, at 3-4), he shed no light on the matter. The only witness to testify regarding the regulatory language itself was petitioner's expert, a former FAA Director of Flight Standards, Richard Skully. It was his opinion that the rule contemplated more than one certificate.¹⁰ On the other hand, as the Administrator urged during closing arguments before the law judge, §§ 61.77(a) and (c) speak to "a" special purpose certificate.

We cannot find on this record that the rule either expressly authorizes or prohibits multiple certificates. Use of the plural and the singular may only be coincidental, and neither Mr. Skully's nor the Administrator's analysis is compelling.¹¹

¹⁰He testified, among other things, that the rule's use of the phrase "each certificate" supported his position. See Tr. at 379-382.

¹¹In closing, the Administrator also argued that, just as with an airline transport pilot or private pilot certificate, only one is issued. That analogy is not useful, as these

Subsection (d)(3), which allows the Administrator to limit a certificate to the degree he considers necessary, is a broad statement that can be read to encompass a one certificate/one lessee policy.¹² Absent an answer from the rules themselves, we turn to other record evidence regarding the Administrator's intent.

Petitioner introduced a memo to Regional Flight Standards Division Managers from FAA headquarters, Air Transport Division, dated December 30, 1988. The memo states, in part:

This is to confirm our long standing policy that the holder of a valid special purpose airman certificate will not be issued an additional special purpose airman certificate nor will the holder be reissued a certificate authorizing additional lessees.

Petitioner claims this memo was written after the fact -- to create policy when there was none, so that the FAA's denial could be defended. The Administrator counters that long-standing policy did, in fact, exist, and the law judge so found.

The record contains considerable discussion of the Air Transport Operations Inspector's Handbook both to prove and disprove each party's claims of FAA policy or lack thereof. The 1984 version of that manual contained a section on SPPCs (see Exhibit P-2). Section 9.1751(d) stated:

An airman will not be issued a Special Purpose Airman
(..continued)
certificates do not restrict operations under them in the manner the Administrator urges here in the case of SPPCs.

¹²It could also be read, as petitioner urges, solely to permit limitations on certificates that are issued. In petitioner's view, denying certificates is different from limiting them.

Certificate with a new lessee if an active similar certificate is on file from a former lessee.

We disagree with petitioner's claim that this provision cannot reasonably be read to reflect a one certificate/one lessee policy.¹³

Petitioner continues with a more convincing argument -- this provision was not carried forward in the 1988 revision of the manual. Therefore, according to petitioner, if the Administrator's current reading of this language ever was policy, it was not in effect when his multiple SPPC was denied.

Although we give considerable deference to the Administrator's interpretation of his own regulations, we must reject as unsupportable his response that, to the extent the 1988 revision did not address the issue, the 1984 version remains applicable. Logic, as well as the introduction to the updated manual, belie this contention. See Exhibits P-6 and 7. Exhibit P-6 states "Direction and guidance published in this order supersedes related information in current publications." As direction and guidance on SPPCs is offered in the 1988 revision, it is more reasonable, we think, to conclude that guidance in the prior manual is superseded.

Perhaps omission of paragraph (d) was an oversight, or

¹³Mr. Pomales erroneously used the 1984 manual when he was considering petitioner's 1989 application. He did not read its language to prohibit multiple certificates and, apparently, FAA employee(s) he consulted before issuing the certificates did not either. Still, on its surface, the 1984 manual appears to indicate that an airman may not receive a certificate for more than one active lessee.

perhaps it was not considered necessary because the one certificate/one lessee policy was generally understood. We cannot tell from the record, as the Administrator made no real effort to explain the genesis of paragraph (d), or the 1988 revision.¹⁴ The Administrator also fails to respond to petitioner's contention that, if this policy ever existed, the fact that it was dropped is confirmed by the FAA's failure to publish the December 1988 memo directions in a 1989 supplement to the manual.

The Administrator does, however, respond with uncontroverted testimony that Mr. Pomales' action in granting approximately 12 multiple certificates was a mistake.¹⁵ Mr. Pomales testified that, in acting on the applications tendered by Mr. Stemen, he checked with Oklahoma City, and not with Washington headquarters.

He acknowledged that the latter, not the former, makes FAA policy and that the December 1988 memo reflected the official and

¹⁴The law judge found that the two manuals were not inconsistent and that, despite the 1988 lack of carryover, the policy was still in effect. Tr. at 516. We agree to the extent these findings relate to the existence of FAA policy independent of handbooks. To the extent they might be read, however, to mean that paragraph (d) of the 1984 manual survived the 1988 revision, we must disagree based on the words of the manual itself. That elsewhere employees are invited to seek guidance concerning matters that are unclear does not supersede the explicit statement that prior direction is displaced.

¹⁵The law judge found that many of these certificates were still in force. Tr. at 510. This finding is not borne out by the testimony. Ultimately, Mr. Pomales did not know the status of the multiple certificates he had issued, other than he believed the FAA was taking action against them. In any case, the status of the outstanding certificates does not affect our analysis.

continuing FAA position.

Overall, we reach the same conclusion we reached in Miller: whether the Administrator's interpretation of this rule is sustainable is a question for which there is no clearly compelled outcome. However, the Administrator's interpretation of the rule is not either logically or grammatically offensive to its language. Although the Administrator's interpretation is, to our knowledge, offered officially for the first time in this proceeding, it is not inconsistent with any prior pronouncements that have been brought to our attention.¹⁶ That the 1988 manual did not carry with it the 1984 provision does not, by itself, require or warrant a finding that the premise of the 1984 provision was repudiated by the Administrator.¹⁷ Similarly, the failure to include the thrust of the 1988 memo in the 1989 changes to the handbook does not repudiate or substantially undermine the 1988 memo. For one, we have no evidence regarding FAA procedure or guidelines for what is included in the manuals.

Thus, we cannot judge whether failure to include the gist of the December 1988 memo in the 1989 handbook update has any significance whatsoever.

Although it would have been far better and easier had the Administrator introduced useful testimony regarding these

¹⁶It is possible, of course, to consider a consistent pattern and practice equivalent to a pronouncement, but here the only evidence of practice was that of Mr. Pomales, and this is claimed to have been a mistake.

¹⁷See discussion, supra. What the manual provided at the time is one factor to be considered. It is not the only factor.

matters, petitioner has the burden of proof, and he has not proved his contentions by a preponderance of the evidence, as required. He did not, as another example, offer any evidence to show that even one other FAA employee other than Mr. Pomales (who testified that he did so by mistake) issued multiple certificates. In sum, we cannot find on this record that the Administrator's interpretation of his rule is not consistent with the words of the rule or with his past position.¹⁸

ACCORDINGLY, IT IS ORDERED THAT:

1. Petitioner's appeal is denied; and
2. The initial decision is affirmed as set forth in this opinion.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

¹⁸Even if the Administrator's position were new, its application to petitioner would not necessarily be precluded, provided it was within the Administrator's power to adopt and due process standards were met. By contrast with Miller, where the Administrator sought to impose a penalty based on a new interpretation of a rule, no penalty is involved here. Due process concerns, therefore, do not counsel against applying the Administrator's policy to petitioner.

Appendix

§ 61.77 **Special purpose pilot certificate: Operation of U.S.-registered civil airplanes leased by a person not a U.S. citizen.**

(a) General. The holder of a current foreign pilot certificate or license issued by a foreign contracting State to the Convention on International Civil Aviation, who meets the requirements of this section, may hold a special purpose pilot certificate authorizing the holder to perform pilot duties on a civil airplane of U.S. registry, leased to a person not a citizen of the United States, carrying persons or property for compensation or hire. Special purpose pilot certificates are issued under this section only for airplane types that can have a maximum passenger seating configuration, excluding any flight crewmember seat, of more than 30 seats or a maximum payload capacity (as defined in § 135.2(e) of this chapter) of more than 7,500 pounds.

(b) Eligibility. To be eligible for the issuance or renewal of a certificate under this section, an applicant or a representative of the applicant must present the following to the Administrator:

(1) A current foreign pilot certificate or license, issued by the aeronautical authority of a foreign contracting State to the Convention on International Civil Aviation or a facsimile acceptable to the Administrator. The certificate or license must authorize the applicant to perform the pilot duties to be authorized by a certificate issued under this section on the same airplane type as the leased airplane.

(2) A current certification by the lessee of the airplane -

(i) Stating that the applicant is employed by the lessee;

(ii) Specifying the airplane type on which the applicant will perform pilot duties; and

(iii) Stating that the applicant has received ground and flight instruction which qualifies the applicant to perform the duties to be assigned on the airplane.

(3) Documentation showing that the applicant has not reached the age of 60 and meets the medical standards for the foreign pilot certificate or license required by paragraph (b)(1) of this section, except that a U.S.

medical certificate issued under Part 67 of this chapter is not evidence that the applicant meets those standards unless the State which issued the applicant's foreign pilot certificate or license accepts a U.S. medical certificate as evidence of medical fitness for a pilot certificate or license.

(c) Privileges. The holder of a special purpose pilot certificate issued under this section may exercise the same privileges as those shown on the certificate of license specified in paragraph (b)(1) of this section, subject to the limitations specified in this section. The certificate holder is not subject to the requirements of § § 61.55, 61.57, and 61.58 of this part.

(d) Limitations. Each certificate issued under this section is subject to the following limitations:

(1) It is valid only -

(i) For flights between foreign countries or for flights in foreign air commerce;

(ii) While it and the foreign pilot certificate or license required by paragraph (b)(1) of this section are in the certificate holder's personal possession and are current;

(iii) While the certificate holder is employed by the person to whom the airplane described in the certification required by paragraph (b)(2) of this section is leased;

(iv) While the certificate holder is performing pilot duties on the U.S.-registered civil airplane described in the certification required by paragraph (b)(2) of this section;

(v) While the medical documentation required by paragraph (b)(3) of this section is in the certificate holder's personal possession and is currently valid; and

(vi) While the certificate holder is under 60 years of age.

(2) Each certificate issued under this section contains the following:

(i) The name of the person to whom the U.S.-registered civil aircraft is leased.

(ii) The type of aircraft.

(iii) The limitation: "Issued under, and subject to, § 61.77 of the Federal Aviation Regulations."

(iv) The limitation: "Subject to the privileges and limitations shown on the holder's foreign pilot certificate or license."

(3) Any additional limitations placed on the certificate which the Administrator considers necessary.

(e) Termination. Each special purpose pilot certificate issued under this section terminates -

(1) When the lease agreement for the airplane described in the certification required by paragraph (b)(2) of this section terminates;

(2) When the foreign pilot certificate or license, or the medical documentation, required by paragraph (b) of this section is suspended, revoked, or no longer valid;

(3) When the certificate holder reaches the age of 60; or

(4) After 24 months after the month in which the special purpose pilot certificate was issued.

(f) Surrender of certificate. The certificate holder shall surrender the special purpose pilot certificate to the Administrator within 7 days after the date it terminates.

(g) Renewal. The certificate holder may have the certificate renewed by complying with the requirements of paragraph (b) of this section at the time of application for renewal.